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No. 350

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 24245

PASQUALE PALERMO,

Plaintiff-Appellee,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Appellant.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLEE

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BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

By the issues posed in the appeal from a unanimous jury verdict for the plaintiff-appellee,* left undisturbed by the trial Judge upon full consideration of defendant-appellant's* motions, it follows that defendant misconceives the necessary elements and purpose of appellate review. Defendant again seeks to argue a defense that was rejected by the triers of the facts, in almost complete disregard of the record which substantially supports the verdict and rulings below. By its arguments on a clearly inadequate appendix, and its refusal to discuss the facts and conclusions favoring plaintiff's cause, necessarily drawn in the light of the verdict, defendant fails to follow the rule of appellate appraisal on the complete record of testimony and exhibits. Because defendant's statement of facts amounts to a misstatement of facts, and the issues posed on page 4 of

* Plaintiff-appellee is hereinafter referred to as plaintiff; defendant-appellant as defendant.

defendant's brief are completely out of context with the true state of the record, plaintiff hereinafter will first set forth what he considers the proper issues on appeal, and then will recite a statement of facts supported by a fair and more comprehensive appendix gleaned from the entire record herein.

The Issues on Appeal

1. Should a verdict be assailed on the ground of an alternative safe passageway where the testimony from all witnesses, including those of the shipowner-defendant, as well as the log of the vessel, clearly show that the port passageway necessarily used by the plaintiff was unsafe, and that the alternative starboard passageway presented even greater hazards of cargo gear in operation and drafts in the process of discharge?

2. Where the medical testimony unanimously agrees that the 45 year old plaintiff's entire right upper extremity has become 100 percent industrially disabled, an almost immobilized and useless appendage by reason of the accident involved herein, forever disabling him from engaging in any manual work of the nature he knows, can the trial Court's decision to deny the motion contending excessiveness on the verdict of $65,000.00 be assailed? The Court below considered all the facts and concluded there was "substantial evidence to support the verdict" as "The plaintiff also established by medical testimony that the plaintiff was very seriously injured, and that the right upper extremity of his arm was practically completely disabled * * *" (12a of defendant's appendix).

With those issues in mind while reading the completely supported statement of facts hereinafter, the conclusion is inescapable that the appeal by defendant is *pro forma*, designed more to delay execution on a properly grounded

judgment than to present fairly considered issues on a record to be read in the light of the findings favoring plaintiff.

Statement of Facts

On February 16, 1955, shortly after 7:00 P. M., the plaintiff, as a hatch foreman employed by Turner & Blanchard, Inc., proceeded on the port passageway to join his gang in the after part of No. 2 hatch of the C-4 cargo vessel known as the MARINE SNAPPER, which lay starboard to the 35th Street Pier, Brooklyn, New York, for the purpose of cargo discharge on that side. While so proceeding in the port passageway between the raised deck house and the port side he was caused to sustain injuries which are the subject matter of this suit.

All that is stated above is accepted by defendant in its brief; substantially all that follows it ignores or disputes.

The Physical Layout and Condition of the Place of Accident:

Hatch Boss Guarracino, in charge of the gang in the forward part of the same hatch in which plaintiff's gang was working in the after portion, testified that a winch drum was located about a foot away from the port passageway leading to the No. 2 hatch, as demonstrated in a photograph taken by the defendant, and that a sill or three inch elevation at the forward end of this passageway was parallel with the end of the drum (1a, 2a, 3a, 7a).*

That prior to the accident he had noticed grease spots in the area; the winch drum was greased and oiled by members of the ship's crew (6a, 9a), and that the runners there were covered with grease by means of a mop-like brush

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* Numbers in parentheses with suffix "a" refer to page in plaintiff-appellee's appendix to brief.